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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13
14 EBAY INC.,) CASE NO. C 08-4052
15 Plaintiff,)
16 vs.)
17 DIGITAL POINT SOLUTIONS, INC.;)
18 SHAWN HOGAN; KESSLER's FLYING)
CIRCUS; THUNDERWOOD HOLDINGS,)
INC.; TODD DUNNING; DUNNING)
ENTERPRISES, INC.; BRIAN DUNNING;)
BRIANDUNNING.COM; and DOES 1-20,)
Defendants.)
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REPLY BY DEFENDANTS
THUNDERWOOD HOLDINGS, INC.,
BRIAN DUNNING AND
BRIANDUNNING.COM TO
OPPOSITION TO MOTION TO STAY
CIVIL ACTION PENDING CRIMINAL
PROCEEDINGS

DATE: November 20, 2009
TIME: 9:00 a.m.
CTRM: 3

Hon. Jeremy Fogel presiding

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1 Defendants Brian Dunning, Thunderwood Holdings, Inc. and Briandunning.com
 2 (collectively, "Defendants") reply to the Consolidated Opposition to Motions to Stay Civil
 3 Action Pending Resolution of Criminal Proceedings filed by Plaintiff eBay, Inc. ("Plaintiff"
 4 and/or "eBay") as follows:

5 **EBAY'S ARGUMENT THAT THE ABSENCE OF CRIMINAL CHARGES**
 6 **AGAINST DEFENDANTS IS FATAL TO THE MOTION IS WITHOUT MERIT**

7 eBay argues that Defendants' motions should be denied because "no criminal
 8 action is pending against any Defendant." However, eBay concedes that plenty of case law
 9 exists (at least eleven cases acknowledged by eBay) where a stay of the civil proceeding was
 10 granted by the court pending a criminal investigation of the defendant and prior to actual
 11 indictment. (i.e., *Am. Motorists Ins. Co. v. Bridger Pub. Sch. Dist. #2*, No. CV06-124-BLG-
 12 RFC-CSO, 2007 WL 1227592 (D. Mont. Apr. 24, 2007); *Brock v. Tolkow*, 109 F.R.D. 116
 13 (E.D.N.Y. 1998); *Chao v. Fleming*, 498 F.Supp.2d 1034 (W.D. Mich. 2007); *Kashi v.*
 14 *Gratsos*, 790 F.2d 1050 (2d Cir. 1986); *Shell Offshore, Inc. v. Courtney*, No. 05-1956, 2006
 15 WL 1968926 (E.D. La. July 12, 2006); *Taylor, Bean & Whitaker Mortgage Corp. v.*
 16 *Triduanum Fin. Inc.*, No. CIV. 2:09-cv-0954 FCD EFB, 2009 WL 2136986 (N.D. Cal. July
 17 15, 2009); *United States v. \$557,993.89 in U.S. Funds*, No. 95-CV-3978-JG, 1998 WL
 18 817651 (E.D.N.Y. Mar. 2, 1998); *United States v. Certain Real Prop. & Premises*, 751
 19 F.Supp. 1060 (E.D.N.Y. 1989); *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F.Supp.2d
 20 523 (D.N.J. 1998); *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084 (5th Cir. 1979); *White v.*
 21 *Mapco Gas Prods., Inc.*, 116 F.R.D. 498 (E.D. Ark. 1987)).

22 In addition, eBay does not dispute, nor otherwise challenge, the declaration
 23 testimony of criminal counsel for the Defendants that, according to the United States
 24 Attorney's Office, the bringing of criminal charges against Defendants in the near future is a
 25 virtual certainty:

26 Criminal counsel for Defendants: "Mr. Waldinger [the prosecuting
 27 United States Attorney] informed me that: (a) Mr. Brian Dunning is a
 28 target of the investigation, along with two other named persons; (b) the

federal government is confident that a criminal offense could be proven, based on the fraudulent conduct of one or more persons; and (c) until the federal government has concluded its analysis of the computer media seized, the federal government is unwilling to discuss any resolution of its case.”

* * *

"I have reviewed my file and in those letters I have confirmed in writing that Mr. Waldinger advised me that: (1) Mr. Dunning is a 'target' of the federal criminal investigation; (2) the investigation concerns Thunderwood Holdings, Inc. ('Thunderwood') and Kessler's Flying Circus ('KFC') and its relationship with eBay, and allegations that 'cookies' had been 'forced' in violation of the terms of service with Plaintiff eBay ('Plaintiff') and/or Commission Junction, Inc., which allegedly constitutes 'cyber-fraud' under various federal fraud statutes."

* * *

"Mr. Waldinger has confirmed that the criminal investigation of Mr. Dunning is ongoing, that search warrants other than that discussed above have issued, and in my opinion, based on my experience, I believe it is likely that the federal government has presented testimony in this investigation to the United States Grand Jury for the Northern District of California. In addition, the federal government has sought from the District Court, and obtained, several extensions of time to return all the materials seized from Mr. Dunning's home pursuant to the aforementioned federal search warrant, which called for its return within 60 days unless additional time is granted. Typically, in order to obtain such permission from the federal court, the United States Attorney must allege that there is an active criminal investigation, that the federal government believes the property seized constitutes, or is likely to

constitute evidence of the suspected crime, and that additional time is reasonably needed to complete the investigation.”

* * *

Criminal counsel for the Hogan Defendants: "On September 22, 2009, I spoke via telephone with Assistant U.S. Attorney Kyle Waldinger of the United States Attorney's Office for the Northern District of California (USAO). The subject of the conversation was the pending criminal investigation being undertaken by the USAO and the Federal Bureau of Investigation. During the course of the conversation, Mr. Waldinger indicated the following: (1) Mr. Hogan is the subject of an ongoing criminal investigation as to whether activities associated with Plaintiff's affiliate marketing program constitute wire fraud under 18 U.S.C. § 1343; (2) the scope of the investigation relates to the 'cookie stuffing' schemes alleged against the Defendants in this case; (3) Mr. Waldinger believes that Section 1343 has been violated; (4) the USAO intends to seek an indictment based on the foregoing; and (5) and it is likely that an indictment will be issued within the early part of next year."

19 eBay's argument is based essentially on a single case from the Northern District
20 which eBay contends holds, as a matter of law, that a stay is not permitted where an indictment
21 has not yet issued, namely *Applied Materials, Inc. v. Semiconductor Spares, Inc.*, 1995 WL
22 261451 (N.D. Cal. 1995). eBay, however, misrepresents the *Applied Materials* case. The
23 *Applied Materials* court did not deny a stay because no indictment had issued as to the
24 defendant. Quite to the contrary the *Applied Materials* court determined that the defendant had
25 a "significant" fifth amendment interest despite the absence of an indictment. This was so, the
26 court reasoned, because (1) the defendant had not yet given deposition testimony regarding the
27 case, and therefore had not waived any fifth amendment rights, and (2) the federal criminal
28 investigation of the defendant concerned the same subject matter as the civil suit. *Applied*

1 *Materials, supra, at *3.* The *Applied Materials* court ultimately determined that a stay was
 2 not appropriate because the remainder of the *Keating* factors weighed against a stay: “While
 3 defendant Biehl has some fifth amendment interests in staying the case, the interests of
 4 plaintiff, the courts and the public in proceeding promptly outweigh that interest.” As such,
 5 contrary to eBay’s argument, the lack of an indictment against Defendants is not fatal to the
 6 motion.

7 Unlike in the *Applied Materials* case, it cannot be reasonably disputed that an
 8 indictment of Defendants is a virtual certainty as made clear by the unequivocal and repeated
 9 statements of Mr. Waldinger. Indeed, Mr. Waldinger has even given a time frame in which he
 10 expects indictments to issue – early next year. eBay does not challenge the veracity of the
 11 declaration testimony submitted by counsel for Defendants, nor does eBay submit any
 12 contradictory declaration testimony regarding the intentions of the Government although
 13 counsel for eBay admits to have had conversations with Mr. Waldinger. All eBay does by way
 14 of evidence in response to the declaration testimony submitted by Defendants is submit the
 15 declaration of counsel for eBay, Sharon Bunzel, who gives a self serving tutorial of how she
 16 believes investigations proceed to indictment. Ms. Bunzel’s pseudo “expert” testimony bears
 17 no relevance to what has transpired and what is to come in this case in light of the specific
 18 representations of Mr. Waldinger as to the certainty and timing of indictments against
 19 Defendants. The only pertinent aspect of Ms. Bunzel’s declaration is her confirmation that she
 20 served as an Assistant United States Attorney from 1999 to 2005 *in the very same Office as*
 21 *Mr. Waldinger.* At the very least, Ms. Bunzel is in a unique position to obtain information
 22 contradicting the Government’s intentions as evidenced by the declaration testimony submitted
 23 by Defendants. No such contradictory evidence was submitted by eBay.

24 The relationship between counsel for eBay and the particular Office of the
 25 United States Attorney investigating Defendants highlights the particular unfairness of allowing
 26 this civil action to proceed pending the Government’s investigation and indictment of
 27 Defendants. As set forth in the Motion, by its own description, the CHIP Unit is charged with
 28 combating “cybercrime and intellectual property theft” and “works closely with the FBI and

1 other agencies *to establish a relationship with the local high tech community and encourage*
 2 *them to refer cases to law enforcement.*" The CHIP Unit is specifically charged with
 3 coordinating law enforcement and the technology industry "*to share expertise and information*
 4 *technology, to assist each other 24 hours a day, seven days a week, around the clock, to*
 5 *prevent cybercrime wherever possible...*" Based on this stated mode of operation, and the pre-
 6 existing relationship between counsel for eBay and the very Office investigating Defendants, it
 7 cannot be reasonably disputed that eBay and the Government are working in tandem as to the
 8 civil and criminal prosecution of Defendants. Indeed, eBay concedes in its Opposition that
 9 Defendants' alleged cookie stuffing scheme "ended only with eBay's investigation of
 10 Defendants' wrongdoing in June 2007" – *the very month the FBI executed a search warrant*
 11 *of Mr. Dunning's home and interrogated him for hours at the scene.* There can be no doubt
 12 that eBay and the United States Attorneys' Office were, and are, working hand in hand against
 13 Defendants. In all likelihood, any delay in the Government formally charging Defendants is by
 14 design. The Government intends to benefit from eBay's prosecution of this civil action and
 15 otherwise obtain facts and analysis to which it would not otherwise be entitled. In short, the
 16 Government seeks to use the considerable resources and technical know-how of eBay to
 17 enhance its prosecution of Defendants. In turn eBay benefits from this concerted relationship
 18 with the Government by wielding the prospect of criminal prosecution as a mechanism to
 19 intimidate and threaten Defendants in the context of this civil action – indeed, eBay portends its
 20 own private policing arm. In the balance hangs the Constitutional fifth amendment rights of
 21 Defendants.

22 Defendants' fifth amendment interests are overwhelmingly significant in this
 23 case – much more so than in any case cited by the parties (including the recent decisions of this
 24 Court in the *Conte* and *Continental Insurance* cases which eBay does not even address in its
 25 Opposition) and in particular the *Applied Materials* case so prominently displayed by eBay.
 26 On the basis of the implications of Defendants' fifth amendment rights alone, the stay should be
 27 granted.

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1 2. **EBAY'S CONTENTION THAT IT WILL BE SEVERELY PREJUDICED BY THE**
 2 **STAY IS SIMPLY NOT CREDIBLE**

3 The idea that a multi-billion dollar company such as eBay would be severely
 4 prejudiced by the delay of this action (even a lengthy delay of this action) is not credible.

5 First, eBay's argument that any delay of its discovery efforts would "prevent
 6 eBay from discovering other witnesses and evidence in support of its case" is baseless.
 7 This case was commenced by eBay over 14 months ago. Nevertheless, eBay has not conducted
 8 a single deposition in this case. Indeed, although eBay propounded written discovery on
 9 Defendants some 10 months ago, it only recently filed a motion to compel the same and only
 10 did so in response to Defendants' notice that Defendants intended to file a motion to stay the
 11 action. eBay's sudden concern about its ability to conduct contemporaneous discovery in
 12 connection with this case is contrived.

13 Next, eBay is well aware that other than the individual defendants named in this
 14 action (all of whom assert their fifth amendment rights), the persons with knowledge of the
 15 facts underlying the action are either employees of eBay or employees of eBay's agent,
 16 Commission Junction. eBay has access to all such individuals without resort to formal
 17 discovery procedures. Indeed, in its Opposition eBay does not specify what critical discovery
 18 it believes will be prevented by a stay. eBay's conclusory argument that a stay will prevent
 19 necessary discovery does not hold water.

20 Finally, eBay ignores the case law cited by Defendants which holds that a stay is
 21 permitted where the alleged harm to the plaintiff "may be remedied by monetary damages and
 22 plaintiff can be adequately compensated even if she obtains a judgment in her favor after the
 23 stay has lifted." *Taylor, Bean & Whitaker Mortgage Corporation v. Triduanium Financial*,
 24 2009 WL 2136986 (E.D.Cal. 2009) (granting a stay despite plaintiff's argument that it will be
 25 more difficult to recover losses if the case is stayed). Rather, eBay reveals what appears to be
 26 a significant motivation in opposing a stay – keeping both the criminal and civil matters in play
 27 and thereby exerting as much financial pressure on Defendants as possible.

28 / / /

1 In short, eBay does not effectively refute the fact that no significant prejudice
 2 will befall it in the event a stay is granted.

3 **EBAY DOES NOT EFFECTIVELY REFUTE THAT THE BURDEN ON**
 4 **DEFENDANTS IN DEFENDING THIS ACTION IS SEVERE**

5 Mr. Dunning is an individual of modest means with a wife and children who are
 6 dependant upon him. Needless to say, Mr. Dunning's ability to defend himself against
 7 criminal charges is paramount. Any compromise of such ability would be devastating to
 8 Mr. Dunning. More specifically, proceeding with this case will force Mr. Dunning to choose
 9 between defending himself in this action and preserving his fifth amendment rights as well as
 10 having to fund two defenses at once. In addition, proceeding with this case will unfairly allow
 11 the federal government to monitor this proceeding for the purpose of obtaining incriminating
 12 testimony through civil discovery undermining the fifth amendment and all concepts of
 13 fundamental fairness. By its own account the CHIP Unit of United States Attorney's Office is
 14 working closely with eBay in connection with the prosecution of Defendants. Such a close
 15 working relationship by its very design has caused a collision of the fundamental rights
 16 guaranteed to Mr. Dunning by the Constitution. As detailed in the Motion, both the *Jones* and
 17 *Continental Insurance* courts recognized this injustice and ordered the civil actions stayed
 18 pending the conclusion of the parallel criminal proceedings. eBay fails to substantively address
 19 these cases in its Opposition.

20 The *Jones* and *Continental Insurance* courts' rationale was recently adopted and
 21 affirmed in *Taylor, Bean & Whitaker, supra*, where a stay of civil proceedings pending parallel
 22 criminal proceeding was ordered because "[t]he parallel civil proceeding '*might undermine the*
 23 *party's Fifth Amendment privilege against self-incrimination, expand rights of criminal*
 24 *discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expand the basis of*
 25 *the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.*'"
 26 *Id.* at 2, citing, *SEC v. Dresser, supra*, 628 F.2d at 1376. There cannot be a more on point
 27 justification for the stay requested by Defendants in this case.

28 ///

1 As such, it cannot be reasonably disputed that proceeding with this action in
 2 light of the parallel criminal proceedings would severely prejudice Mr. Dunning. eBay's
 3 purported concern regarding the collectability of any potential judgment rings hollow
 4 considering eBay's overwhelming resources and wealth, particularly when held up against the
 5 potentially devastating consequences of Mr. Dunning not being able to adequately and fully
 6 defend himself against the criminal charges to be filed by the Government.

7 4. EBAY DOES NOT EFFECTIVELY REFUTE THE CONVENIENCE OF THE
 8 COURT AND INTEREST OF THE PUBLIC FACTORS OF THE KEATING TEST

9 eBay does not, because it cannot, explain how a stay of this case will have the
 10 practical effect of inconveniencing the court. Indeed, a stay of the action necessarily results in
 11 the court not having to involve itself in the action until the stay is lifted. Moreover, eBay does
 12 not dispute that “[s]taying the case makes efficient use of judicial resource by insuring that
 13 common issues of fact will be resolved and subsequent civil discovery will proceed
 14 unobstructed by concerns regarding self incrimination.” *Jones, supra*, at 2 (internal citations
 15 omitted). eBay has no response to this powerful argument.

16 Furthermore, eBay has no retort to the established point that the interest of the
 17 public favors a stay because “the public’s interest in the integrity of the criminal case is entitled
 18 to precedence over the civil litigant.” *Jones, supra*, at 2; *see also, Javier H. Garcia-Botello,*
 19 *supra*, 218 F.R.D. at 75. A stay of this action will particularly advance the public’s interest in
 20 the integrity of the criminal justice system since a stay will thwart the publically declared
 21 arrangement between eBay and the U.S. Attorney’s Office to work in tandem as against
 22 Defendants.

23 In short, these factors weigh heavily in favor of a stay.

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1 THE STATE COURT'S PREVIOUS DENIAL OF DEFENDANTS' MOTION TO
 2 STAY THE PREVIOUS STATE COURT ACTION TO WHICH EBAY WAS NOT A
 3 PARTY HAS NO BEARING ON THIS CASE

4 eBay makes much of the fact that the state court previously denied a motion to
 5 stay action filed by Defendants in the state court action commenced by Commission Junction
 6 against Defendants to which eBay was not a party. This fact has no bearing on this proceeding
 7 for several reasons.

8 First, the legal standard under state law for staying an action pending a criminal
 9 proceeding is much different than that under federal law. The *Keating* factors which all favor a
 10 stay in this case were not considered in the state court. Second, contrary to eBay's explanation
 11 of why the state court denied a stay, the state court ruled as it did because it saw no reason to
 12 stay the action "as long as the Defendant can assert his fifth amendment rights." (See Exhibit
 13 "E" to Bunzel Dec. at 6:150-18). This reasoning is inapposite to the standard applicable in this
 14 Court. Indeed, it is undisputed that the primary consideration under federal law as to the
 15 propriety of a stay is the extent to which the defendants' fifth amendment rights are implicated.
 16 In other words, the fact that a defendant can and will assert such rights in the context of the
 17 civil proceedings weighs in favor of a stay.

18 In addition, the state court action did not involve eBay and there was no
 19 indication, as there is in this case, that the Plaintiff in that case and the government were acting
 20 in concert against the Defendants. The relationship between eBay and the U.S. Attorney's
 21 Office described in the Motion and above, is in and of itself a basis for the stay requested by
 22 Defendants in this case.

23 In short, the state court's previous denial of Defendants' Motion to Stay the
 24 previous state court action (to which eBay was not a party) has not bearing on this case.

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1 6. CONCLUSION

2 For all of the foregoing reasons, Defendants respectfully request that the Motion
3 be granted in its entirety and this action be stayed as to all Defendants pending the conclusion
4 of the criminal proceedings against Mr. Dunning.

5
6 DATED: November 6, 2009

Respectfully submitted,

7 RUS, MILIBAND & SMITH
A Professional Corporation

8
9 By:

10 LEO J. PRESIADO
11 Attorneys for Defendants
12 Thunderwood Holdings, Inc., Brian Dunning
13 and BrianDunning.com

CERTIFICATE OF SERVICE

I, Rhonda Radford, declare as follows:

I am employed in the County of Orange, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 2211 Michelson Drive, Seventh Floor, Irvine, California 92612, in said County and State. On November 6, 2009, the document(s) entitled:

**REPLY BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING
AND BRIANDUNNING.COM TO OPPOSITION TO MOTION TO STAY CIVIL ACTION
PENDING CRIMINAL PROCEEDINGS**

was/were served as follows:

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I am employed in the office of Rus, Miliband & Smith, APC, a member of the bar of this Court, and the foregoing document(s) was/were printed on recycled paper.

FEDERAL I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 2009, at Irvine, California.

foregoing is true and correct.


RHONDA RADFORD